NO. AAN-CV18-6026839-S	: SUPERIOR COURT
HUSH IT UP, LLC	: J.D. OF ANSONIA-MILFORD
VS.	: AT MILFORD
PLANNING AND ZONING COMMISSION OF THE CITY OF SHELTON	: AUGUST 1, 2019

REPLY TO OBJECTION TO MOTION FOR CONTEMPT

On July 23, 2019, the Defendant filed a two-sentence objection to the Plaintiff's motion for contempt, stating in its entirety, "In accordance with the direction of the Court the Shelton Planning and Zoning Commission with the aid of its staff has reviewed the record and determined that parking spaces required for the appellant's use are 35 in number. This information and calculation is more detailed in Schedule A attached hereto." (This is more than twice the number of parking spaces that the Defendant has previously claimed throughout this case were required.) Notably, the Defendant did not deny the Plaintiff's assertion that it was in civil contempt of the Court's order.

The referenced exhibit is a one-page email, marked "Draft", dated July 2, 2019, together with a copy of the Shelton Parking Regulations, from one "Tony Panico"[1] to counsel for the Defendant and Ken Nappi, the Shelton Zoning Administrator, in which Mr. Panico opines, "It appears to me that the applicable parking standard for the proposed HUSH cafe is found in Sec. 42 of the Shelton Zoning Regulations (copy attached), under Commercial and Industrial Sales, Service and Manufacturing Uses, Standard 31 and it states as follows: Use: Restaurant, cocktail lounge or similar use for

[1] The email does not identify who Tony Panico is. The Plaintiff's understanding from the Defendant is that he is the City Planner. Searches of the words "Panico" and "City Planner" on the City of Shelton website, however, yield no results.

sale or consumption of food or beverage on the premises with more than sixteen (16) seats: One (1) parking space for each one hundred (100) square feet of gross floor area plus one (1) additional space for each 50 square feet of patron bar and/or cocktail lounge area." Mr. Panico then show his mathematical calculation under his reading of that formula.

The Court's order, or the "direction of the Court" as the Defendant calls it, was what the Court had stated in its memorandum of decision regarding the off-street parking requirement, if any, which is applicable to the Plaintiff's proposed use of the subject property (the "Premises"):

> The court is not persuaded by the commission's argument that the fire marshal's decision was guided by the regulations. The sections referred to by the commission do not provide for minimum standards for RBD zones or for the type of property described in the plaintiff's application. Furthermore, the commission, in their supplemental brief, has failed to provide any formula used by the fire marshal to determine that the property would require seventeen parking spaces. Accordingly, the court finds that the commission's reliance on the fire marshal's occupancy finding was not supported by the record and therefore, **the issue of off-street parking is remanded to the commission with instructions that it conduct a further review of the records to locate any evidence of support for its conclusion as well as to calculate a formula for the off-street parking requirements.**

(Emphasis added.) Hush respectfully submits that the Defendant's purported compliance with the order of the Court, and its reply to the motion for contempt, are unsatisfactory.

First, the Defendant's response amounts to a concession that the Court is correct in its conclusion that the record ("ROR") in this case does not support the Defendant's claim that the fire marshal's determination that the Plaintiff's proposed use of the

Premises requires 17 off-street parking spaces was based on the Shelton Zoning Regulations.

Second, on March 23, 2011, the Defendant approved a special exception to permit a hibachi grill and table service in the Premises with a parking plan that the Defendant expressly acknowledged included 45 parking spaces. That special exception was recorded on March 28, 2011 in Volume 3196 at Page 349 of the Shelton land records. (The Plaintiff will present a certified copy of that recorded document at the hearing on this motion.) Later, in 2014, the occupant previous to the Plaintiff - Zigana, a wine and tapas bar - applied for a certificate of zoning compliance and obtained it, resulting in the issuance of a certificate of occupancy on October 1, 2014. (The Plaintiff is prepared to document that at the hearing on this motion as well.) An off-street parking requirement was not mentioned in that certificate of occupancy.

Even if it is assumed *arguendo* that 35 off-street parking spaces are needed under the Shelton Parking Regulations, the special exception with a parking plan that the Defendant expressly acknowledged included 45 parking spaces was not personal to the applicant, but when recorded on the land records runs with the land.

> Section 8-3d of the General Statutes, which applies to variances and special permits, but does not apply to site plans, reads:
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> > No variance, special permit or special exception granted ... shall be effective until a copy thereof ... containing a description of the premises to which it relates and specifying the nature of such variance, special permit or special exception ... is recorded in the land records of the town in which such premises are located. The town clerk shall index the same in the grantor's index under the name of the then record owner ...

> Special permits, like variances, attach to the property, and run with the land. Former Judge Robert A. Fuller has explained that special permits cannot be limited as to time, or personalized to any individual: "when a special permit is issued by the zoning commission ... it remains valid indefinitely, since the use allowed under it is a permitted use, subject to conditions in the regulations. The agency cannot put an expiration date on and require renewal of special permits ... because that automatically would turn a permitted use into an illegal use after the time period expired ... If the conditions of a special permit are violated, the remedy is a zoning enforcement proceeding since there is no statutory provision allowing revocation or expiration of special permits." Fuller, Robert A. Land Use Law and Practice, (fourth edition), Vol. 9B, Section 50.1, page 516.
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> Superior Court cases which have considered this issue have adhered to the rule outlined by Judge Fuller. Madore v. Haddam Zoning Board of Appeals, judicial district of Middlesex, Docket # CV-11-6005648 S (August 21, 2012, Handy, J.) [54 Conn. L. Rptr. 519]; Gozzo v. Simsbury Zoning Commission, judicial district of New Britain, Docket # CV-07-4015865 S (July 24, 2008, Cohn, J.) [46 Conn. L. Rptr. 110]; Shaw v. Westport Planning & Zoning Commission, judicial district of Fairfield at Bridgeport, Docket # CV-02-0395344 S (July 12, 2005, Owens, J.T.R.) [39 Conn. L. Rptr. 648].

International Investors v. Fairfield Town Plan & Zoning Commission, No. FBTCV186074152S, 2019 WL 1453075, at *7 (Conn. Super. Ct. Feb. 14, 2019) (Radcliffe, J.). See also, e.g., TWK, LLC v. Meriden Zoning Bd. of Appeals, No. CV 97400324S, 1999 WL 30815, at *3 (Conn. Super. Ct. Jan. 8, 1999) and cases cited therein; N&L Assocs. v. Planning & Zoning Comm'n of City of Torrington, No. CV040093492S, 2005 WL 1634621, at *4 (Conn. Super. Ct. June 8, 2005) and cases cited therein. Accordingly, as the Premises is already in compliance with what the Defendant now claims is the off-street parking requirement of 35 spaces, the number of required off-street parking spaces is clearly not a basis for the Defendant's continuing failure and refusal to issue the certificate of zoning compliance for which the Plaintiff has applied. The Plaintiff put the Defendant on notice of that by email on July 29, 2019, and

demanded that the certificate of zoning compliance be issued forthwith, meaning not later than this Friday, August 2, 2019, without the need to proceed with this contempt motion. As of the filing of this reply memorandum, the Defendant has remained recalcitrant and contemptuously defiant in the face of the law, the facts and this Court's reversal of the denial of the Plaintiff's application for a certificate of zoning compliance.

Third, the Shelton Parking Regulations, by their terms, were adopted on August 28, 2013 and became effective on September 13, 2013. " 'It is a fundamental zoning precept in Connecticut ... that zoning regulations cannot bar uses that existed when the regulations were adopted.' Beckish v. Planning & Zoning Commission, 162 Conn. 11, 16, 291 A.2d 208 (1971)." Taylor v. Zoning Board of Appeals of Town of Wallingford, 65 Conn. App. 687, 694, 783 A.2d 526 (2001). The Premises are in a building which, as the Plaintiff is prepared to prove at a hearing on this motion, has been in use for decades as a restaurant, catering facility, hibachi grill and wine bar. In fact, for many of those years, the restaurant there was owned and operated by the mayor of Shelton, Mark A. Lauretti (who has been subpoenaed to testify at the hearing on this motion). The use of the Premises, especially when bolstered by the special exception acknowledging 45 parking spaces which runs with the land, pre-dates the Shelton Parking Regulations. Accordingly, even if the Premises did not have 35 parking spaces, its use without that many spaces would be grandfathered by law as well as under Shelton Zoning Regulations Section 41.1 which provides, "Any use of land, buildings and other structures and any building or other structure, lawfully existing on the effective date of these Regulations or any amendment hereto, and which does not conform to

one or more of the provisions of these Regulations, may be continued in accordance with the following provisions hereinafter specified." There can be no denying that the use of the Premises as a café with an excess of ten parking spaces beyond what even the Defendant claims are needed is in compliance with the Shelton Zoning Regulations. There is no excuse for the Defendant continuing not to issue the certificate of zoning compliance, and it must realize.

Fourth, although it really does not matter based on the arguments presented above other than to show the continued recalcitrance and contemptuous defiance of the Defendant, the Plaintiff notes that with respect to calculating a formula for an off-street parking requirement, the Defendant erroneously relies on an inapplicable category in a use classification tables in the Shelton Parking Regulations, i.e., the classification of a "Restaurant, cocktail lounge or similar use for sale or consumption of food or beverage on the premises with more than sixteen (16) seats." (The Defendant in its original brief had previously claimed that the parking requirements for a "theater or auditorium use" applied to the Premises, but has changed its story and has abandoned that claim in the face of its rejection by the Court.) The Plaintiff, however, is not proposing to use the Premises as a restaurant with a restaurant liquor permit. It is to be a café, for which the Plaintiff had obtained a café liquor permit. For purposes of the Liquor Control Act (C.G.S. §§ 30-1 et seq.), restaurants for which the Liquor Control Division of the Department of Consumer Protection issues restaurant permits, and cafés for which it issues café permits, are not the same. A "restaurant" is defined by C.G.S. § 30-22(f):

> "Restaurant" means space, in a suitable and permanent building, kept, used, maintained, advertised and held out to the public to be a place

> **where hot meals are regularly served**, but which has no sleeping accommodations for the public **and which shall be provided with an adequate and sanitary kitchen and dining room** and employs at all times an adequate number of employees.

(Emphasis added.)

A "café" is defined by C.G.S. § 30-22a(c):

> “[C]afe” means space in a suitable and permanent building, kept, used, maintained, advertised and held out to the public to be a place **where alcoholic liquor and food is served for sale at retail for consumption on the premises but which does not necessarily serve hot meals**; it shall have no sleeping accommodations for the public **and need not necessarily have a kitchen or dining room** but shall have employed therein at all times an adequate number of employees.

(Emphasis added.) As for a "cocktail lounge", the Plaintiff does not know what that is. It is not a legal term of art, and it is not defined in the Liquor Control Act, the Connecticut General Statutes, the liquor control regulations promulgated by the Commissioner of Consumer Protection, the Shelton Zoning Regulations, the Shelton Parking Regulations, the Code of Ordinances of the City of Shelton, or Black's Law Dictionary.[2]

Fifth - and once again, although it really does not matter based on the arguments presented above other than to show the continued recalcitrance and contemptuous defiance of the Defendant - it is questionable whether the Defendant's calculation of 35 spaces under the portion of the Shelton Parking Regulations on which it now relies is correct. The formula stated therein is "One (1) parking space for each one hundred (100) square feet of gross floor area plus one (1) additional space for each 50 square

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[2] For whatever it may be worth, the dictionary definition of "cocktail lounge" is "a public room, as in a hotel or airline terminal, where cocktails and other drinks are served." https://www.dictionary.com/browse/cocktail-lounge, last accessed on July 31, 2019. That is not what the Plaintiff's proposed use of the Premises is.

feet of patron bar and/or cocktail lounge area." The Defendant is interpreting this formula as requiring the double-counting of the patron seating area. The fact that not one of the 52 other parking space formulae set forth in the use classification tables in the Shelton Parking Regulations double-counts any area in the premises is a strong indication that this poorly worded formula ought not to be read as meaning that the patron seating area is to be double-counted.

For all the reasons explained above, the Plaintiff respectfully reiterates its request that the Court grant the motion by finding the Defendant in civil contempt and ordering it to pay the Plaintiff a compensatory fine of $5,000 per month and a reasonable attorney's fee for the cost of pursuing the instant motion for contempt and to enforce the judgment, and order further that the Defendant may purge itself of the contempt order by issuing the Plaintiff a certificate of zoning compliance, or by directing the Zoning Enforcement Officer, who has the authority to issue a certificate of zoning compliance himself under Section 2.1 of the Shelton Zoning Regulations, to issue the certificate of zoning compliance, forthwith.

The Appellant, HUSH IT UP, LLC

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CERTIFICATION

I hereby certify that a copy of the above was electronically delivered on August 1, 2019 to all counsel of record and that written consent for electronic delivery was received from all counsel of record who were electronically served, at:

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